UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

vs.

D-4 PAUL STEWART,

Defendant.
______________________________/

CRIMINAL NO. 12-20030

HON. NANCY G. EDMUNDS

MEMORANDUM OF THE UNITED STATES CONCERNING RESTITUTION

The United States of America presents the following as its Memorandum concerning restitution by defendant Paul Stewart:[1]

Defendant Paul Stewart should be ordered to pay restitution to the victims harmed by his criminal conduct which betrayed their trust. Stewart stands convicted of accepting bribes and kickbacks as part of a wide-ranging honest services fraud conspiracy. The victims of Stewart's crimes are the Retirement Systems of the City of Detroit and the pensioners, beneficiaries, and employees who paid into those systems. As set forth below, the United States is seeking a restitution award of $16,846,880. This amount represents the direct and proximate losses that the victims suffered as a result of the corrupted decisions that Stewart

[1]The United States and defendant Jeffrey Beasley have reached an agreement concerning a stipulated restitution award to be paid by Beasley that will be proposed to the Court. As a result, the government's memorandum is not directed at seeking a recovery from Beasley.

made as a trustee after he accepted tens of thousands of dollars in cash from individuals having business before him.

I. Legal Basis for the Restitution Award

The Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. § 3663A, requires a defendant convicted of "an offense against property under [Title 18 of the United States Code] . . . including any offense committed by fraud or deceit" to pay restitution to the "victim" of the crime. *Id.* § 3663A(a)(1), (c)(1)(A)(ii). Stewart's crime of honest services fraud conspiracy is an offense against property. The MVRA defines a "victim" of an offense as a "person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered," and a government agency can be a victim. *Id.* § 3663A(a)(2); *United States v. Sapoznik*, 161 F.3d 1117, 1121 (7th Cir. 1998).

In this case, there is no dispute that Detroit's Retirement Systems and their pensioners and beneficiaries were the victims of Stewart's crime. The issue to be decided by the Court relating to restitution is the amount of restitution to be ordered, and whether the Court can determine that Stewart's crime was the proximate cause of the harm to the victims. Section 3663A(b)(1) provides that, in the case of a crime which results in loss or damage to property, the victim is entitled to either the return of the property or, if the return of the property is impractical, the value of the property. "A restitution award need only be a reasonable estimate of the victim's actual losses." *United States v. Germosen*, 139 F.3d 120, 129-30 (2d Cir. 1998); *United States v. Leahy*, 464 F.3d 773, 794 (7th Cir. 2006) (court affirmed trial court's decision that defendant owed 10% of contract's value even where loss was "inherently difficult to quantify").

For purposes of the MVRA, after a jury verdict, the allegations in the indictment define the scope of the fraud scheme. *United States v. Jones*, 641 F.3d 706, 714 (6th Cir. 2011). "In the context of a conspiracy, it is clear that a defendant is liable in restitution to all of the victims of the reasonably foreseeable acts of his co-conspirators." *United States v. Collins*, 209 F.3d 1, 3 (1st 1999). Furthermore, "under the MVRA, if someone is convicted of a conspiracy, the court can order restitution for damages resulting from any conduct that was part of the conspiracy." *United States v. Elson*, 577 F.3d 713, 723 (6th Cir. 2009); *see United States v. Lewis*, 104 F.3d 690, 693 (5th Cir. 1996) (defendant responsible for restitution based on fraudulent food stamp transactions at the store where he was employed and also the fraudulently food stamp transactions conducted by other members of the conspiracy at a store where the defendant did not work).

The purpose of the MVRA is "essentially compensatory: to restore a victim, to the extent money can do so, to the position he occupied before sustaining injury." *United States v. Boccagna*, 450 F.3d 107, 115 (2d Cir. 2006). The purpose of restitution is not to punish the defendant, but to make the victim whole again by restoring to it the value of the losses it suffered as a result of the defendant's crime. *United States v. Cornier-Ortiz,* 361 F.3d 29, 42 (1st Cir. 2004). While "absolute precision" in calculating a restitution award is not required, *United States v. Burdi*, 414 F.3d 216, 221 (1st 2005), and the court may resolve uncertainties "with a view towards achieving fairness to the victim," it must still make a "reasonable determination of appropriate restitution." *United States v. Vaknin*, 112 F.3d 579, 587 (1st Cir. 1997).

The Sixth Circuit has indicated that "some sort of restitution" award is "mandatory—regardless of a defendant's financial situation—when a defendant is convicted of . . . an offense against property" under the MVRA. *United States v. Vandeberg, 201 F.3d 805, 813 (6th Cir. 2000)*. When ordering restitution pursuant to the MVRA, a court must order restitution in full without considering the defendant's economic circumstances. *Elson*, 577 F.3d at 733; 18 U.S.C. § 3663(f)(1)(A).

In *United States v. Kilpatrick*, 798 F.3d 365 (6th Cir. 2015), the Sixth Circuit reversed the Court's restitution award which had been based on the gain of defendants' Kilpatrick and Ferguson. The Sixth Circuit held that "a district court may not use the defendant's gain to approximate the victim's loss unless the government establishes such a correlation that the defendant's gain can act as a measure of—not a substitute for—the victim's loss." *Id.* at 390. In this case, the

United States will not use the defendants' gain as a basis for restitution, except where there is a direct correlation between the two.

II. Losses to the Retirement Systems Due to Stewart's Criminal Conduct

Stewart's criminal conduct in accepting bribes and kickbacks from individuals having business before the Police and Fire Retirement System of Detroit resulted in real losses to the Retirement System amounting to tens of millions of dollars. The government, however, is cognizant of the Court's view, as well as the view of controlling case law, concerning the difficulty in sorting out the proximate cause of some of the losses to the Retirement System relating to a number of the deals that were the subject of the trial. As a result, in this memorandum, the government is only seeking a restitution award where the amount of the losses can be directly and proximately attributable to Stewart's criminal conduct. In addition, the government is limiting its request to loss amounts that cannot otherwise be said to have been the result of normal fluctuations in the markets. In total, the United States is seeking a restitution award as to Stewart in the amount of $16,846,880.

A. Losses Due to the Zajac Salary Increase

First, Stewart caused losses to the Retirement System by voting in favor of a 33% salary increase for co-defendant Ronald Zajac. Stewart and fellow trustee Martin Bandemer each accepted $5,000 in cash from Zajac at an August 2007 birthday party that Zajac organized for the two trustees. Zajac collected the $10,000 in cash from individuals having business before the Retirement System who hoped to curry favor with trustees Stewart and Bandemer. Zajac also played a key role in organizing third party marketers and investment sponsors to pay for meals, drinks, and entertainment for Stewart, Bandemer, and other trustees following pension board meetings and during pension board travel.

After accepting thousands of dollars in cash, both Stewart and Bandemer then voted in favor of the 33% salary increase for Zajac two months later. This raise for Zajac was on top of a raise and cost of living adjustment that Zajac had already received earlier in 2007. Directly as a result of the substantial salary increase for Zajac, the Police and Fire Retirement System expended an additional $234,000 of the pensioners' money to pay Zajac up to 2012.[2] In this instance, the gain to co-defendant and co-conspirator Zajac is directly correlated to the loss suffered by the victim Retirement System. Zajac had been the General Counsel of the Retirement System for over 30 years, and there is no dispute that Zajac would have continued on in that capacity at least up through 2012 at his prior salary. As a result, the Retirement System's loss matched the gain to Zajac. Furthermore, unlike the *Kilpatrick* case, where other contractors would have replaced Bobby

[2]In total, Detroit's two Retirement Systems paid Zajac an additional $468,000 in increased salary from October 2007 up to 2012. Because Stewart served only as a trustee of the Police and Fire Retirement System, the government is not seeking a restitution award of $468,000 in this regard from him, even though it is arguable that he should be liable for the overall conspiracy.

Ferguson and would have gotten paid by the city absent the corrupt payments, in this case, the loss to the retirement System is measured by the dramatic increase in salary that Stewart voted for and passed in 2007 following the corrupt payments.

B. Losses Due to the ICG Leaseback Deal

A second area of losses to the Retirement System that can be tied to Stewart's involvement in the criminal conspiracy relates to the ICG Leaseback deal involving Robert Shumake. In September 2007, Stewart opposed the ICG Leaseback deal that was proposed to the Retirement Systems. In December 2007, Shumake began making a series of cash payments, at the suggestion of Zajac, to Stewart. Stewart then changed his vote and voted in favor of the ICG Leaseback deal. In this instance, the loss to the Retirement Systems can be measured by the increased fees and payments to third party marketers that Shumake acquired from the corrupt trustees. The Court will recall that in connection with the ICG Leaseback deal, the trustees were presented with eight possible scenarios. In the end, Beasley and Stewart voted in favor of the ICG Leaseback scenario that was the least favorable to the Retirement Systems, but the most favorable to Shumake and his third party marketers Derrick Miller and Steven Pankake.

Because Beasley and Stewart supported scenario 8, the Retirement Systems paid an additional $1,181,440 in fees to Pankake and Miller. In contrast, scenarios 4 and 7 presented to the board of trustees did not require the Retirement Systems to pay fees to Shumake's third party marketers, but the fees were instead paid by Shumake. The Retirement Systems suffered a further $1,181,440 in losses as a result of the fees that were paid directly to Shumake under scenario 8. This $1.1 million fee was on top of the percentage fees that Shumake received going forward. By contrast, scenario 4 required no $1.1 million fee to Shumake, and thus was far more favorable to the Retirement Systems. Again, the Retirement Systems suffered a direct loss due to the vote by Stewart that was corrupted by the thousands of dollars in cash bribes and later kickbacks that Stewart accepted from Shumake. If the trustees had voted in favor of scenario 4, with no additional fees to Shumake, Pankake, and Miller, then the pensioners would not have suffered the loss of paying the additional $2.2 million.

C. Losses From the McRae Land Deal

The third area of losses suffered by the Retirement System connected to Stewart's criminal conduct involved the McRae land deal. The McRae deal involved the purchase of approximately 1,100 acres of vacant land in Texas. Steve Pankake acted as a third party marketer on the deal in 2007, and Pankake earned a $300,000 fee once the deal went through. By Stewart's own admission, Pankake gave over $10,000 in cash to Stewart in 2007. Pension board minutes revealed that Stewart played a key role in the McRae deal, repeatedly bringing motions before the board to push the McRae deal forward. After the Retirement System invested $15 million in the McRae deal, the system subsequently lost over $14.25 million. At trial, the current financial analyst for the Retirement System testified that it was highly unusual for a pension fund to suffer a nearly 100% loss on a land deal as occurred in McRae. In 2007, Steve Burns served as the expert real estate advisor to the Retirement System. In August 2007, Burns advised the trustees to not support the McRae deal because it was a highly risky investment. Stewart and other trustees ignored this advice and voted in favor of the deal, which then suffered almost a total loss. Furthermore, Burns was fired at the urging of Stewart soon after Burns advised against the McRae deal.

In summary, Stewart pushed through the highly risky McRae deal after accepting over $10,000 in cash from the third party marketer on the deal, even after the Retirement System's real estate advisor urged the trustees not to invest because it was not an appropriate investment. Stewart should be held responsible for the $14.25 million in losses that then resulted from the deal that he pushed through after accepting cash bribes from the deal's marketer.

III. Conclusion

For the reasons set forth above, the United States requests that the Court enter a restitution award in the amount of $16,846,880 against defendant Stewart.

Respectfully submitted,

BARBARA L. MCQUADE
United States Attorney

s/DAVID A. GARDEY
s/JULIE BECK
Assistant U.S. Attorneys
211 West Fort Street, Ste. 2001
Detroit, Michigan 48226-3211
313-226-9591

DATED: January 11, 2016

CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

Elliott Hall, Esq.

s/DAVID A. GARDEY
Assistant United States Attorney
211 W. Fort Street, Suite 2001
Detroit, MI 48226
Phone: (313) 226-9591
E-Mail: David.Gardey@usdoj.gov
Bar No. P48990

DATED: January 11, 2016